

STATE OF MICHIGAN
COURT OF APPEALS

FINANCIAL FREEDOM SENIOR FUNDING
CORPORATION,

UNPUBLISHED
January 19, 2012

Plaintiff-Appellee,

v

ANTHONY D. JAMES,

No. 292981
Wayne Circuit Court
LC No. 06-623022-CZ

Defendant-Appellant.

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order denying his motion to set aside the default entered against him and denying his motion for summary disposition. We affirm.

Defendant argues that the trial court lacked jurisdiction to enter the default, apparently on the ground that he is incarcerated and allegedly received no notice of the proceedings. We review de novo the trial court's determination that it had jurisdiction over defendant, as well as the trial court's denial of summary disposition. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 152; 677 NW2d 874 (2003). A trial court "cannot adjudicate [an in personam] controversy without first having obtained jurisdiction [over the] defendant by service of process" *Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 274; 803 NW2d 151 (2011) (quoting *Eisner v Williams*, 298 Mich 215, 220, 298 NW 507 (1941)).

The record demonstrates that defendant, through his previous counsel, filed an answer to plaintiff's complaint. Although defendant argues that he received no notice of the proceedings while incarcerated, the record shows that filings were mailed to defendant at the correctional facility. Defendant's answer and the filings constitute sufficient proof that defendant was aware of and had notice of the proceedings at hand. Moreover, in his answer to plaintiff's complaint, defendant expressly stated that he did not contest personal jurisdiction. Therefore, the trial court properly concluded that it had jurisdiction over defendant. See also *Deeb v Berri*, 118 Mich App 556, 563-564; 325 NW2d 493 (1982) (An appearance by a party is any act acknowledging jurisdiction by the trial court).

We review the trial court's entry of default for an abuse of discretion. *Amco Builders & Developers, Inc, v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable

and principled outcomes.” *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Further, our Supreme Court has noted “although the law favors the determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered.” *Alken-Ziegler, Inc, v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (citations omitted).

The trial court is authorized to enter a default upon a failure by a party “to plead or otherwise defend” an action against him. *Kowalski v Fiutowski*, 247 Mich App 156, 163; 635 NW2d 502 (2001); MCR 2.603(A). The process for setting aside a default or default judgment is governed by MCR 2.603(D)(1). *Amco Builders*, 469 Mich at 95. MCR 2.603(D)(1) provides:

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown *and* an affidavit of facts showing a meritorious defense is filed. [Emphasis added.]

Unless grounded on lack of jurisdiction over the defendant, a defendant seeking to set aside the default or default judgment must establish good cause and file an affidavit showing a meritorious defense. *Alken-Ziegler*, 461 Mich 229-230. A party may establish good cause by showing either: “(1) a substantial procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default.” *Saffian*, 267 Mich App at 301-302. In assessing whether the defendant established good cause, the trial court considers the following factors:

(1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl v Spence Bros, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008).]

In determining whether the defendant established a meritorious defense, the trial court should consider whether the affidavit provides evidence that: “(1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or (3) the plaintiff’s claim rests on evidence that is inadmissible.” *Shawl*, 280 Mich App at 238.

On appeal, defendant does not challenge the trial court’s conclusion that defendant failed to establish good cause in denying his motion to set aside the default. Accordingly, defendant has failed to establish that the default should be set aside. *Alken-Ziegler*, 461 Mich at 229-230. In addition, regarding the motion for summary disposition, defendant failed to meet the requirement of MCR 2.116(C)(10) of providing some factual support for his contention that the

borrowers' claims are barred and that plaintiff was negligent. The lack of factual support negates his challenge to the default and defeats his motion for summary disposition.

Defendant repeatedly circles back to the lack of notice in arguing that the default should be set aside. A defendant may receive relief from a default where the defendant had no knowledge of the action pending against him. MCR 2.612(B); *Lawrence M Clarke*, 489 Mich at 272-273. Here, however, the record shows that defendant did receive notice of the proceedings, and the record supports the trial court's conclusion that defendant had knowledge of the proceedings. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to set aside the default and in denying defendant's motion for summary disposition.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell